Supreme Court, U.S.
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No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

SALVADOR MAGLUTA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

KIMBERLY HOMAN
SHEKETOFF & HOMAN
84 State Street
Boston, Massachusetts 02109
(617) 367-3449

MARTIN G. WEINBERG
OTERI, WEINBERG & LAWSON
The Statler Building
20 Park Plaza
Suite 905
Boston, Massachusetts 02116
(617) 227-3700

Counsel of Record

ROY BLACK, P.A.
201 S. Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

43pp

QUESTION PRESENTED FOR REVIEW

Whether the holding of the Eleventh Circuit Court of Appeals that law enforcement officers may enter the home of a citizen named in an arrest warrant on less than probable cause to believe that he is within the premises at the time of their entry is contrary to the probable cause requirement of the Fourth Amendment, as embodied in the "reason to believe" standard of *Payton* v. *New York*, 445 U.S. 573 (1980).

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OPINION BELOW

The opinion of the Eleventh Circuit Court of Appeals is reported at 44 F.3d 1530 (11th Cir. 1995).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on February 21, 1995. Petitioner's timely request for rehearing was denied on May 5, 1995.

The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1). This case was in the Court of Appeals on the respondent's appeal, pursuant to 28 U.S.C. § 1291, from the granting of a motion to suppress evidence by the United States District Court for the Southern District of Florida. This case is, accordingly, within the certiorari jurisdiction of this Court. *Nixon* v. *Fitzgerald*, 457 U.S. 731, 743 (1982); Stern, Gressman & Shapiro, *Supreme Court Practice* 224 (6th ed. 1986).

CONSTITUTIONAL PROVISION INVOLVED

The Fourth Amendment to the United States Constitution provides:

> The right of the people to be secure in their persons, house, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the person or things to be seized.

STATEMENT OF THE CASE

On April 10, 1991, a grand jury in the Southern District of Florida returned a 24-count indictment against petitioner Salvador Magluta charging him with various cocaine-related offenses. A warrant for Magluta's arrest was issued the same day. Magluta was arrested at his residence[1] on October 15,

[1] The references in this petition to "his residence" or "Magluta's residence" do not represent a concession that the premises were, in fact, his residence. That issue was contested by petitioner in the hearings before the magistrate judge. The magistrate judge found that there was probable cause to believe that the premises were Magluta's residence, which conclusion was adopted by the district court judge.

1991. The officers who entered Magluta's home to effectuate his arrest possessed a warrant for his arrest but did not at that time have a search warrant for the premises. Following this entry, an application for a search warrant was made, the affidavit in support of which relied in large part upon the observations made inside the residence by the entering officers.

On December 3, 1991, Magluta filed a motion to suppress all evidence seized during the search of his residence pursuant to the search warrant obtained after Magluta's arrest on the grounds, *inter alia*, (1) that the entry in Magluta's residence to arrest him violated the Fourth Amendment to the United States Constitution because the entering officers did not, at the time of the entry, have probable cause to believe that Magluta was within his residence, as required by *Payton* v. *New York*, 445 U.S. 573 (1980), (2) that the observations made by the entry team inside the residence during the arrest entry were the tainted product of the unlawful entry and could not, therefore, be considered in determining whether there was probable cause to issue the search warrant, (3) that when those tainted observations were excised from the probable cause calculus, the warrant which issued was not supported by probable cause, and (4) therefore, that the search of Magluta's residence violated the Fourth Amendment, requiring the suppression of all evidence seized during that search and any and all fruits thereof.

On September 2, 1993, following lengthy evidentiary hearings, Magistrate Judge Brown issued his Report and Recommendation in which he concluded that the entry into Magluta's residence was unlawful because the entering officers had neither probable cause to believe nor reasonable suspicion[2]

[2] Petitioner had argued to the magistrate judge that the "reason to believe" standard of *Payton* v. *New York*, 445 U.S. 573, 613 (1980), embodied a requirement of probable cause to believe that the person named in the arrest warrant was within the premises at the time of the police entry into his home to effectuate his arrest, while respondent argued that mere reasonable suspicion that the individual was at home would suffice. The magistrate judge found it unnecessary to resolve the issue, as he concluded that not even the lesser standard was satisfied in this case.

that Magluta was present at the premises at the time of the entry and that, absent the information recited in the affidavit in support of the search warrant which rested upon the officers' observations during the unlawful entry, the affidavit failed to demonstrate the existence of probable cause. On September 30, 1993, the district court judge (Moreno, J.) issued an order approving and adopting the magistrate judge's report and recommendation in its entirety and granting petitioner's motion to suppress.

Thereafter, respondent United States appealed that determination to the United States Court of Appeals for the Eleventh Circuit pursuant to 28 U.S.C. § 1291, arguing that the *Payton* "reason to believe" standard embodied a requirement of something less than probable cause, albeit perhaps more than articulable suspicion. Despite the government's "fail[ure] to cite a single case in which the *Payton* standard has been defined as embodying less than probable cause," *United States* v. *Magluta*, 44 F.3d 1530, 1534 (11th Cir. 1995), and its own inablity to point to a single case so holding, the Eleventh Circuit concluded that law enforcement officers who possess an arrest warrant may enter the home of the citizen named in that warrant on less than probable cause to believe that he is at home at the time of the entry. *Id.* at 1535.

Petitioner herein seeks a writ of certiorari to review this question of great constitutional magnitude and of fundamental importance to the administration of criminal justice — whether, under the Fourth Amendment to the United States Constitution, the threshold of the home may be crossed by law enforcement officers absent probable cause to believe that the object of their search, *i.e.*, the person named in the arrest warrant, is on the premises at the time of the entry into his home.

REASONS WHY THE WRIT SHOULD BE GRANTED

The holding of the Eleventh Circuit Court of Appeals that law enforcement officers who possess an arrest warrant naming a citizen may enter his home without probable cause to believe that he is there at the time of the entry represents a radical and unprecedented departure from established Fourth Amendment principles. At the core of the historic protections enshrined in the Fourth Amendment lies the sacrosanct threshold of the citizen's home which, with certain very limited exceptions not here relevant, may not be transgressed absent probable cause. "Overriding respect for the sanctity of the home . . . has been embedded in our traditions since the origins of the Republic." *Payton* v. *New York*, 445 U.S. 573, 601 (1980). The decision in this case threatens, if left unchecked,[3] to engender a wholly new — and constitutionally impermissible — "exception" to the requirement of probable cause to search which has historically stood as an inviolable barrier to governmental intrusion into a citizen's home.

This Court should grant certiorari to halt at its inception this unprecedented incursion upon the Fourth Amendment's guarantee that the privacy of a citizen's home will not be invaded by law enforcement officers absent probable cause for the entry.

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[3] In the short time since the decision in this case, the Second Circuit has already adopted in *dictum* the reasoning of the Eleventh Circuit. *United States* v. *Lauter*, 1995 WL 351457 (2d Cir. June 12, 1995). *See* Section I(C), *infra*.

ARGUMENT

THE *PAYTON* "REASON TO BELIEVE THE SUSPECT IS WITHIN" STANDARD EMBODIES A REQUIREMENT THAT LAW ENFORCEMENT OFFICERS MUST, AT THE TIME OF THEIR ENTRY INTO A HOME FOR PURPOSES OF EXECUTING AN ARREST WARRANT NAMING THE RESIDENT OF THE PREMISES, HAVE PROBABLE CAUSE TO BELIEVE THAT THE RESIDENT IS WITHIN HIS HOME.

Entry into the home was the primary evil against which the Fourth Amendment was erected, *United States* v. *United States District Court*, 407 U.S. 297, 313 (1972), drawing upon hundreds of years of English jurisprudence regarding the sanctity of the home, as reflected in Lord Coke's oft-quoted aphorism that "every man's home is his castle," *Semayne's Case*, 3 Coke Rep. 919 (Fraser ed., pt. 5).[4] *Payton* itself recognized that:

> *In terms that apply equally to seizures of property and seizures of persons*, the Fourth Amendment has drawn a firm line at the entrance to the house. Absent exigent circumstances, that threshold may not reasonably be crossed without a warrant.

Payton v. *New York*, 445 U.S. at 590 (emphasis added).[5] *Payton* established a limited exception to the search warrant

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[4] Perhaps nowhere have these fundamental beliefs in the special protections due an individual's home been expressed more eloquently than by Lord Pitt in his 1763 address to the House of Commons, stirring words which "echoed and re-echoed throughout the Colonies," *Payton* v. *New York*, 445 U.S. at 601 n.54:

> The poorest man may in his cottage bid defiance to all the forces of the Crown. It may be frail; its roof may shake; the wind may blow through it; the storm may enter; the rain may enter; but the King of England cannot enter — all his forces dare not cross the threshold of the ruined tenement.

[5] *See, e.g., Coolidge* v. *New Hampshire*, 403 U.S. 443, 474-75 (1971); *Welsh* v. *Wisconsin*, 466 U.S. 740, 750 (1984); *Steagald* v. *United States*, 451 U.S. 204, 214 n.7 (1981); *Jones* v. *United States*, 357 U.S. 493, 497-98 (1958); *McDonald* v. *United States*, 335 U.S. 451, 455-56 (1948); *Johnson* v. *United States*, 333 U.S. 10, 13-14 (1948).

requirement for situations in which police possess an arrest warrant for a named individual *and* have identified a particular residence as that of the person named in the warrant *and* have "reason to believe" that he is at home. *Id.* at 603. Such an exception to the search warrant requirement may not, however, consistent with the common law of sea ch and seizure, this Court's Fourth Amendment jurisprudence of the past two hundred years, and the indisputable position of the home at the core of the protections afforded by the Fourth Amendment, be so readily expanded, as the Eleventh Circuit did, to also encompass an exception to the requirement of probable cause.

A. *This Court's Holding In* Payton *v.* New York *Embodies A Standard of Probable Cause To Believe That The Individual Named In The Arrest Warrant Is At Home.*

1. The Constitutional Principles and Policy Considerations Underlying *Payton* and This Court's Fourth Amendment Jurisprudence Require A Standard of Probable Cause.

The requirement of probable cause to believe that the person named in the arrest warrant is within his residence at the time of the police entry flows directly from the well-recognized principle that, when police enter a home to effectuate an arrest, they conduct a search of the premises, within the meaning of the Fourth Amendment, for that person.[6] *See Steagald* v. *United States*, 451 U.S. 204, 214 n.7 (1981).

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[6] A search of the home pursuant to an arrest warrant may be extremely brief, for example, when the police enter and immediately observe and seize the suspect "in plain view" or it may be virtually as extensive as many searches pursuant to a search warrant, for example, when police — as here — open and inspect closets, cabinets, and all places or objects in the home where a person might conceivably hide, exposing the occupant's private life to the scrutiny of law enforcement officers. Indeed, the *Payton* Court noted that the difference between the authorized scope of a search pursuant to a search warrant and that pursuant to an arrest warrant "may be more theoretical than real. . . ." *Payton* v. *New York*, 445 U.S. at 589.

> The simple language of the [Fourth] Amendment applies equally to seizures of persons and to seizures of property.

Payton v. *New York*, 445 U.S. at 585. A search — either for persons or for things — is reasonable within the meaning of the Fourth Amendment "only when there is 'probable cause' to believe that they will be uncovered in a particular dwelling." *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 555 (1978).

Rather than proceeding from the historic understanding that entry into a home to conduct a search violates the Fourth Amendment unless law enforcement officers have probable cause to believe that the object of their search is on the premises,[7] the Eleventh Circuit regarded this fundamental precept as a matter left open to question by *Payton*, based upon an assumption that had this Court meant to impose a probable cause requirement, it would have employed the words "probable cause" rather than "reason to believe" in its articulation of the *Payton* standard.[8] *United States* v. *Magluta*, 44 F.3d at

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[7] For example, not even the most exigent of circumstances will permit a warrantless search of a home in the absence of probable cause. *See, e.g., Warden* v. *Hayden*, 387 U.S. 294, 298 (1967).

[8] The Eleventh Circuit concluded that "[t]he strongest support for a lesser burden than probable cause remains the text of *Payton*, and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of "reason to believe" over that of "probable cause." *United States* v. *Magluta*, 44 F.3d at 1534. Such an assumption is plainly belied by the fact that this Court has on a number of occasions used various formulations of "reason to believe" language when referring to a requirement universally acknowledged to be one of probable cause. *See, e.g., United States* v. *Watson*, 423 U.S. 711, 714 (1976), *quoting Carroll* v. *United States*, 267 U.S. 132, 156 (1925) ("The usual rule is that a police officer may arrest without a warrant *one believed by the officer upon reasonable cause* to have been guilty of a felony . . ." (emphasis added)); *Johnson* v. *United States*, 333 U.S. 10, 15 (1948) (arrest without warrant valid "only . . . for a felony of which he had *reasonable cause to believe* the defendant guilty" (emphasis added)); *Zurcher* v. *Stanford Daily*, 436 U.S. 547, 556 (1978) ("The critical element in a reasonable search is . . . that there is *reasonable cause to believe* that the specific 'things' to be searched for and seized are located on the property to which entry is sought" (emphasis added)); *id.* at 556 n.6, *quoting*

1534. Such an assumption, however, reflects a deeply flawed understanding of this Court's Fourth Amendment jurisprudence, both before and after *Payton*, and of the holding of *Payton* itself.

While the interests protected by a search warrant and by an arrest warrant may differ somewhat,[9] the *Payton* Court stressed that where such seizures take place inside the home, the level of justification for the entry required by the Fourth Amendment does not differ:

> *The critical point is that any difference in the intrusiveness of entries to search and entries to arrest are merely ones of degree rather than of kind. The two intrusions share this fundamental characteristic: the breach of an entrance to an individual's home.* The Fourth Amendment protects the individual's privacy in a variety of settings. In none is the zone of privacy more clearly defined that when bounded by the unambiguous physical dimensions of an individual's home — a zone that finds its roots in clear and specific constitutional terms: "The right of the people to be secure in their . . . houses . . . shall not be violated."

Payton v. *New York*, 445 U.S. at 589-90 (emphasis added).

Payton does not, therefore, embody a requirement of less than probable cause to believe that the person named in the arrest warrant is at home at the time of the entry; rather, *Payton*

Amsterdam, *Perspectives on the Fourth Amendment*, 58 Minn. L. Rev. 349, 358 (1974) ("Search warrants may be issued only by a neutral and detached judicial officer, upon a showing of probable cause — *that is, reasonable grounds to believe* — that criminally related objects are in the place which the warrant authorizes to be searched, at the time when the search is authorized to be conducted" (emphasis added)).

[9] *See, e.g., Arizona* v. *Hicks*, 480 U.S. 321, 328 (1987); *Steagald* v. *United States*, 451 U.S. at 213 n.7.

permits the arresting officers to make that particular probable cause determination in the first instance, rather than requiring additional resort to a judicial officer, if they have already obtained the determination of a neutral magistrate that there is probable cause to believe that an individual has committed a crime *and* if they have probable cause to believe that the premises are that individual's residence. Such broad discretion having already been delegated to "the officer engaged in the often competitive enterprise of ferreting out crime," *Johnson* v. *United States*, 333 U.S. 10, 13 (1948), the protections of the Fourth Amendment may not be further diluted by permitting these crucial decisions to be based on less than probable cause.

In the *Payton* context, the threat to the sanctity of a citizen's home is vastly intensified by the cumulative effect of the requisite two-tier decisionmaking. Even if police have *probable cause* to believe that the home is the individual's residence, that initial determination by its very nature will often carry with it a degree of reliability falling far short of certainty, or even of probability, as the facts of this case well illustrate. When this less than stringent level of justification is combined with the discretion of the officers to decide for themselves whether they have probable cause to believe that the individual sought is within the premises they believe, although they do not know, to be his home, the resulting level of justification for the entry is already at the far reaches of that permissible under the Fourth Amendment. The time-honored requirement of probable cause is all that stands between a citizen and invasion of every room in his home by, as here, a SWAT team armed to the teeth with weapons and tear gas.

2. The Dissenting Opinion in *Payton* Understood the Majority Opinion to Have Articulated a Probable Cause Standard.

The *Payton* Court had no occasion to engage in extended discussion of the "reason to believe" requirement because, as this Court expressly noted at the outset of its analysis, "in neither case [was] it argued that the police *lacked probable cause* to believe that the suspect was at home when they entered." *Payton* v. *United States*, 445 U.S. at 583 (emphasis added). This language, in conjunction with the Court's comprehensive analysis of the requirements of the Fourth Amendment, demonstrates this Court's opinion of "probable cause" and "reason to believe" as synonymous expressions of the same standard of Fourth Amendment reasonableness.[10]

Certainly the *Payton* dissenters[11] understood the Court to be articulating a probable cause standard, an understanding the majority opinion in no way suggested was a misreading of its holding. *See id.* at 616 n.13 (White, J., dissenting) ("under today's discussion, the officers apparently need an extra increment of *probable cause* when executing an arrest warrant, namely, grounds to believe that the suspect is within the dwell-

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[10] In *People* v. *Payton*, 45 N.Y.2d 300, 305, 380 N.E.2d 224, 225 (N.Y. Ct. App. 1978), the New York Court of Appeals had held that:

> An entry made for the purpose of effecting a felony arrest within the home of the person to be arrested by a police officer who has entered without permission of the owner, *if based upon probable cause*, is not necessarily violative of the constitutional right to be secure against unreasonable searches and seizures even though the arresting officer has not obtained a warrant and there are no exigent circumstances (emphasis added).

In *Payton*, therefore, the requirement of probable cause was taken as a given — as it must be — and the issue before this Court was whether an arrest warrant issued by a neutral magistrate was required *in addition to* probable cause to believe that the suspect had committed a crime *and* probable cause to believe that the suspect was at home.

[11] Justice White, then Justice Rehnquist, and then Chief Justice Burger.

ing" (emphasis added)). Justice White, speaking for all dissenters, noted that he "[did] not necessarily disagree with the Court's discussion of the *quantum of probable cause* necessary to make a valid home arrest," *id.* at 616 n.13 (emphasis added). Instead, he rested his determination that the Fourth Amendment could be satisfied in this context without the requirement of an arrest warrant in part upon the "requirement of probable cause to believe that the suspect is at home," *id.* at 518, and expressed a preference for a rule that would permit law enforcement officers, after knocking and announcing their presence, to enter the home to make a daytime warrantless arrest "when *there is probable cause to believe that the person to be arrested* committed a felony and *is present in the house*." *Id.* at 620 (emphasis added).[12]

B. *Subsequent Fourth Amendment Jurisprudence of This Court Has Been Predicated Upon An Understanding Of The* Payton *"Reason To Believe" Standard As Embodying A Requirement of Probable Cause.*

In *Maryland* v. *Buie*, 494 U.S. 325 (1990), this Court held that police officers who have lawfully entered a home to execute an arrest warrant may conduct a productive sweep of the premises on less than probable cause to believe "that the area to be swept harbored an individual posing a danger to the officers or others." *Id.* at 327. An essential predicate of this holding was the fact that the entry of the arresting officers into the home was justified *ab initio* by probable cause to believe that the person named in the warrant was within his home at the time of the entry: "possessing an arrest warrant *and probable*

[12] *See also United States* v. *Santana*, 427 U.S. 38, 43 (1976) (White, J. concurring) (where officers had probable cause to arrest and probable cause to believe defendant was in the house, arrest warrant not needed to enter house).

cause to believe he was in his home, the officers were entitled to enter and to search anywhere in the house in which Buie might have been found." *Id.* at 332-33 (emphasis added).

The Eleventh Circuit's reasoning in this case fails to recognize that the lesser standard articulated in *Buie* with respect to protective sweeps — to which the Eleventh Circuit's formulation of the *Payton* standard bears a not insubstantial relationship — is permissible under the Fourth Amendment *only* because the presence of the officers inside the home was justified by probable cause to believe that the object of their search — Buie himself — was located upon the premises.[13] *See United States* v. *Santana*, 427 U.S. 38, 42 (1976) (noting that Court had upheld in *Warden* v. *Hayden*, 387 U.S. 294 (1967), the right of police *who had probable cause to believe* that an armed robber had entered a house a few moments before to make a warrantless entry to arrest).

This Court's post-*Payton* jurisprudence has ratified the Fourth Amendment requirement of probable cause to enter a home to arrest and has stressed the critical fact — ignored by the Eleventh Circuit's opinion in this case — that even in those limited circumstances in which the Fourth Amendment permits law enforcement officers to forego advance submission of the probable cause question to a neutral magistrate, this dispensation to permit the police officer on the scene, rather than the magistrate, to make the probable cause judgment in the first

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[13] While the protective sweep in *Buie* was "without question" a search for Fourth Amendment purposes, as was the pat-down in *Terry* v. *Ohio*, 392 U.S. 1 (1968), such searches are permissible on less than probable cause "*only* because they are limited to that which is necessary to protect the safety of officers and others." *Id.* at 1099 n.3 (emphasis added). *See, e.g., Michigan* v. *Long*, 463 U.S. 1032 (1983). *Cf. Arizona* v. *Hicks*, 480 U.S. at 335 (O'Connor, J., dissenting) ("In short, if police officers have a reasonable, articulable suspicion that an object they come across during the course of a lawful search is evidence of a crime, in my view they may make a cursory examination of the object to verify their suspicion. *If the officers wish to go beyond such a cursory examination of the object, however, they must have probable cause*" (emphasis added).

instance *does not lower the level of justification required to legitimize the police action in question*. "Dispensing with the need for a warrant is worlds apart from permitting a lesser standard of *cause* for the seizure than a warrant would require." *Arizona* v. *Hicks*, 480 U.S. 321, 326-27 (1987) (emphasis in original).[14] This Court made this proposition quite explicit in *Arizona* v. *Hicks*:

> Although the interests protected by the Fourth Amendment injunction against unreasonable searches is quite different from that protected by its injunction against unreasonable searches . . . neither the one nor the other is of inferior worth or necessarily requires only lesser protection: *We have not elsewhere drawn a categorical distinction between the two insofar as concerns the degree of justification needed to establish the reasonableness of police action*. . . .

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[14] The difference between *Payton* and this Court's decision in *Steagald* v. *United States*, 451 U.S. 204 (1981), lies not in the degree of justification required to cross the threshold of the home, but rather in who must make the determination that the requisite degree of justification exists. In *Steagald*, this Court held that police armed with a warrant to arrest A may not, in the absence of exigent circumstances, enter B's house to look for him unless a neutral magistrate has first determined that there is probable cause to believe that A will be found within B's house. Absent the requirement of a search warrant issued by a neutral magistrate, the only protection afforded third parties against unlawful invasions of their homes and their privacy would be "the agent's personal determination of probable cause," *id.* at 213, to believe that the person named in the arrest warrant would be found within the third party's home. While leaving the probable cause determination to the arresting officer may sufficiently safeguard the arrestee's privacy interests in his *own* home, it does not suffice to permit lawful entry of a third party's home because an arrest warrant neither particularizes his home as the place to be searched nor provides any judicial imprimatur for the officer's desire to invade the privacy of that third party. That this Court concluded that advance submission of the probable cause to search question to a neutral magistrate is required in the *Steagald* context but not in the *Payton* context does not mean that a lower level of justification is required to legitimize police entry into the arrestee's own home than is required before police may enter third party's home to execute an arrest warrant.

480 U.S. at 328 (emphasis added). This language reflects an implicit recognition by this Court that *Payton* did not affect the "degree of justification" required to validate an entry into the home to seize the individual named in an arrest warrant.

An arrest warrant does no more than explicitly particularize the object of the seizure, *i.e.*, the person named in the warrant, and perhaps implicitly particularize the place to be searched, *i.e.*, the suspect's home. The issuance of an arrest warrant does not, however, erode the cornerstone Fourth Amendment imperative of probable cause to believe that the object to be seized is inside the residence to be searched.

C. *This Court Should Grant Certiorari To Restore The "Firm Line At The Entrance To The House" Drawn By The Fourth Amendment By Invalidating The Unprecedented "Exception" To The Probable Cause Requirement Created By The Eleventh Circuit In This Case.*

Prior to the decision in this case, at least three circuits apparently equated the *Payton* "reason to believe" standard with a requirement of probable cause. *See, e.g., United States* v. *Curzi*, 867 F.2d 36, 39 n.3 (1st Cir. 1989) (government conceded that entry into home could not be justified by arrest warrant for defendant's husband, who also resided in the home, because agents did not have probable cause prior to the entry to believe that the husband was inside the home); *United States* v. *Salvador*, 740 F.2d 752, 757 (9th Cir. 1984), *cert. denied*, 469 U.S. 1196 (1985) (probable cause requires a "reasonable belief . . . that the suspects have committed a crime and are to be found in the place to be searched). *Cf. United States* v. *Clifford*, 664 F.2d 1090, 1093 (8th Cir. 1981) ("If . . . Clifford had a legitimate expectation of privacy in the premises, *Payton* authorizes entry on the basis of the existing arrest warrant for

the defendant *and probable cause to believe that the defendant was within the premises* (emphasis added).[15]

This case represents the first decision of any Court of Appeals to squarely address the level of justification required by the *Payton* "reason to believe" standard before law enforcement officers may invade the sanctity of the home. As demonstrated in the preceding section of this petition, the construction of the *Payton* standard adopted by the Eleventh Circuit in this case constitutes a profound and constitutionally untenable departure from a long-established Fourth Amendment principle which has at its foundation the protection of the home from unwarranted governmental intrusion — the guarantee that a citizen's home will remain inviolate unless law enforcement officers have probable cause to believe that the home contains persons or things for which they are lawfully entitled to enter the premises to search. The Second Circuit has already indicated in *dictum* its willingness to adopt the reasoning of this case:

> Although we agree with the district court's ultimate conclusion, we note that it applied too stringent a test when it held that "officers may properly determine whether they have *probable cause* to believe that an apartment or house is the arrestee's residence, and if

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[15] The former Fifth Circuit, in a case decided before *Payton*, *United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977), stressed the congruence between "reasonable belief" and "probable cause" in terms of the justification required for an entry into a home based upon an arrest warrant for the resident:

> The test is properly framed in terms of reasonable belief. Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a warrant. . . . *Reasonable belief embodies the same standard of reasonableness but allows the officer, who had already been to the magistrate to secure an arrest warrant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate and without exigent circumstances.*

> probable cause exists, they may enter such premises to effect the arrest when they have a reasonable basis to believe that the arrestee will be present (emphasis added). As noted above, the proper inquiry is whether there is a *reasonable belief* that the suspect resides at the place to be entered to execute an arrest warrant, and whether the officers have reason to believe that the suspect is present. *See Magluta*, 44 F.3d at 1533, 1535.

United States v. *Lauter*, 1995 WL 351457 (2d Cir. June 12, 1995) (emphasis in original). In fact, the *Lauter* dictum, if embraced as the basis for subsequent decision of the Second Circuit — or, for that matter, of any court — threatens an even more radical incursion upon the requirement of probable cause than that already effected by the Eleventh Circuit in this case, in that it would permit governmental intrusion into a citizen's home on less than probable cause to believe that the home to be entered was the residence of the person named in the arrest warrant *and* on less than probable cause to believe that he was at home at the time of the entry.

CONCLUSION

The Eleventh Circuit's construction of the *Payton* "reason to believe" standard is a holding of critical constitutional dimension, one which opens a door to the entry of a citizen's home traditionally regarded as locked and barred by the Fourth Amendment and permits the crossing of the threshold of a citizen's "castle" absent probable cause to believe that the object of the search is located upon the premises at the time of the search. As such, this case is quintessentially appropriate to the exercise of this Court's certiorari jurisdiction to reverse the opinion of the Eleventh Circuit and to restore the "firm line

at the entrance to the house" drawn by the Fourth Amendment, *Payton* v. *New York*, 445 U.S. at 590.

For all the foregoing reasons, petitioner prays that this Honorable Court grant a Writ of Certiorari to review the decision of the Eleventh Circuit Court of Appeals.

Respectfully submitted,

KIMBERLY HOMAN
SHEKETOFF & HOMAN
84 State Street
Boston, Massachusetts 02109
(617) 367-3449

MARTIN G. WEINBERG
OTERI, WEINBERG & LAWSON
The Statler Building
20 Park Plaza
Suite 905
Boston, Massachusetts 02116
(617) 227-3700

Counsel of Record

ROY BLACK, P.A.
201 S. Biscayne Boulevard
Suite 1300
Miami, Florida 33131
(305) 371-6421

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APPENDIX A

UNITED STATES of America,
Plaintiff-Appellant,

v.

Salvador MAGLUTA, a/k/a Sal, a/k/a Santiago Menendez, a/k/a Angelo Maretto, Defendant-Appellee.

No. 93-5069.

United States Court of Appeals,
Eleventh Circuit.

Feb. 21, 1995.

Christopher Clark, Ann Hayes, Linda Collins Hertz, Asst. U.S. Attys., Miami, FL, for appellant.

Jeffrey S. Weiner, Miami, FL, for Orlando Lorenzo.

Martin G. Weinberg, Boston, MA, for Salvador Magluta.

Appeal from the United States District Court for the Southern District of Florida.

Before KRAVITCH and HATCHETT, Circuit Judges, and CLARK, Senior Circuit Judge.

KRAVITCH, Circuit Judge:

The United States government appeals the district court's order granting Salvador Magluta's motion to suppress evidence obtained by federal and state law enforcement agents after entry

into a residence for the purpose of executing outstanding arrest warrants.[1] We REVERSE and REMAND.

1. *Factual Background and Procedural History*

In April 1991, a federal grand jury in the Southern District of Florida returned a 24 count indictment charging Salvador Magluta with numerous offenses involving cocaine trafficking, including conspiracy to import cocaine, conspiracy to possess with intent to distribute cocaine, importation of cocaine, and possession with intent to distribute cocaine. Orlando Lorenzo was charged in the conspiracy counts of the indictment.[2] Arrest warrants were issued for Magluta and Lorenzo, and the United States Marshals Service's fugitive apprehension unit was assigned the task of locating Magluta and Lorenzo, as well as other named suspects.[3] Despite extensive investigation, the marshals were unable to locate or apprehend Magluta and Lorenzo until October 31, 1991, when a previously reliable confidential source in custody provided Deputy Marshal Keith Braynon with information regarding the location of Magluta's and Lorenzo's respective residences. The confidential informant ("CI") had obtained this information from Luis Mendez, a co-defendant in the instant case who had been arrested less

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[1] The government brings this interlocutory appeal pursuant to 18 U.S.C. § 3731. The district court granted a joint motion to suppress in favor of Salvador Magluta and his co-defendant, Orlando Lorenzo. Although the government initially appealed the grant of this motion as to both Lorenzo and Magluta, since the appeal was filed, Lorenzo entered into a guilty plea and the government dismissed its appeal as to him. Accordingly, we need not decide whether the motion to suppress was properly granted in Lorenzo's favor.

[2] Eight other individuals were also named in the indictment.

[3] During the previous year, marshals had sought Magluta and another co-defendant, Augusto Falcon, on outstanding arrest warrants from several jurisdictions. Testimony before the magistrate judge showed that Magluta was arrested by local law enforcement officers in 1988, pursuant to state warrants, but that he had disappeared from the Dade County Jail under unexplained circumstances.

than a month earlier. The CI gave Braynon a map showing the location of Magluta's residence,[4] and informed Braynon that Lorenzo was Magluta's friend and drug associate, who frequently visited Magluta's house. The CI also reported that there was a smaller residence on the premises occupied by bodyguards, that Lorenzo lived south of Magluta's residence in an aparment building on Miami Beach, and that Mendez had been at the residence within the past month.

On October 15, 1991, at about 6 A.M., Braynon went to the location of the house on the map, later identified as 98 East La Gorce Circle (hereinafter "98 East La Gorce"), and verified that the house was lived in. The house is located on a private island, La Gorce Island, the sole entrance to which is monitored by guards who operate an entry gate from a guard shack. Braynon noted that the lawn was manicured and that a porch light was on. A gold Honda car, a large motor home, a white Chevrolet Astro van, and a gray Pathfinder were parked outside of the residence. Later that morning, Braynon returned and the marshals established a surveillance team at the entrance to La Gorce Island. At approximately 12:20 P.M., the gold Honda drove away; the driver, according to Braynon, resembled Lorenzo. When the afternoon guard, Michael Vaccaro, arrived at 3:00 P.M., Braynon showed him photos of Lorenzo and Magluta. According to Braynon, Vaccaro identified Lorenzo as a person who frequented 98 East La Gorce, and although he could not positively identify Magluta, he noted that a man who looked like Magluta lived at 98 East La Gorce and drove a white Chevy Astro van. Contrary to Braynon's recollection, Vaccaro later testified that he had only identified Lorenzo to Braynon, and that he did not provide any information with respect to Magluta, the owner of the Chevy Astro van,

[4] The map was not available at the time of the suppression hearing, and it does not appear that it was ever produced to the defendants.

or the identity of the resident of 98 East La Gorce.[5] Vaccaro testified that was not the man that he had seen driving the white Astro van, but rather, he provided a description of the van's driver that did not match Magluta.

At approximately 5:00 P.M., the gold Honda returned to the island, and Braynon, who was stationed in the guard's shack, thought he recognized the driver as Lorenzo. Based upon the facts described above, Braynon and his supervisor, Deputy Marshal Sean Conboy, decided that they had sufficient information to conclude that fugitives named in the indictment were present at 98 East La Gorce. Between 5:30 and 6:00 P.M. the agents and local police approached the house in marked Miami Beach police cruisers. Conboy stated that four men were standing in the front porch area of the house, and that upon seeing the police cars approach, two men, including a man matching Lorenzo's description, entered the house. The other two men on the porch immediately surrendered. Over a loudspeaker, Conboy directed everyone to leave the house. Two more men complied, but based upon the statements of detainees who had exited the residence, the marshals believed that at least two suspects remained inside.

After several minutes, a six-person special operations group (SOG) team,[6] led by Inspector Michael Cameron, sprayed an irritant gas, similar to tear gas, into the house. A minute later the team entered and performed a protective sweep of the house, which lasted five to seven minutes. During the sweep, the team located Lorenzo, who was suffering from effects of the gas, and escorted him from the house. Also during the sweep,

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[5] Michael Lamonico, the morning guard, testified that he did not provide the agents with any information regarding the occupants of the residence or any vehicles connected to those residents. He did testify, though, that he had identified a picture of Lorenzo for the marshals. Braynon's supervisor, Deputy Marshal Sean Conboy did not recall that the morning guard identified Lorenzo as a frequent visitor.

[6] SOG teams are the Marshals Service's equivalent of a SWAT team.

marshals observed in plain view two nylon gym bags, numerous papers, telephones, a telefax machine and a floor safe. A detainee told Conboy that another man remained in the house, and an agent then observed that a person might have jumped from a second story window. A search of the bushes surrounding the house, with the assistance of a Miami Beach police dog, resulted in Magluta's capture.

Simultaneously with the search of the main house, Miami police secured the guest house and executed a protective sweep as well. During the sweep, police discovered a box containing stacks of currency.[7] No further search occurred until Special Agent David Borah of the Drug Enforcement Agency obtained a search warrant. The search executed pursuant to the warrant located fax machines, large assortments of jewelry and U.S. currency, a suitcase with ledgers, portable phones, beepers and an electronic rolodex.

Magluta and Lorenzo moved to suppress the evidence seized during the above-described searches. After an evidentiary hearing, the magistrate judge issued a report and recommendation in which he found that there was probable cause to believe that Magluta resided at 98 East La Gorce,[8] but that the marshals did not have probable cause or reason to believe Magluta was at the residence at the time the search took place. The magistrate judge concluded that there was no evidence that Magluta was at the property on the day of the search, or anytime within the previous month. He opined that Lorenzo's presence was not dispositive as to Magluta's presence, and the fact that Magluta might have been connected to the Astro van was of "little import

[7] Miami police had to remove a deadbolted closet door and look under a suspiciously raised rug in the closet to find the box of currency.

[8] The magistrate judge based this holding upon the information supplied to the marshals by Mendez via the map, the identification of Lorenzo at 98 East La Gorce, and Braynon's testimony regarding the afternoon guard's tentative identification of Magluta.

since no one had seen Magluta in the house for at least one month," and there was no evidence as to when Magluta last drove the vehicle. The magistrate judge also concluded that neither the inevitable discovery nor independent source exceptions applied in this case. Accordingly, he recommended that the motion to suppress be granted. The district court accepted the magistrate judge's report and recommendation in its entirety, and granted Magluta and Lorenzo's joint motion to suppress. This appeal followed.

II.

[1] The Supreme Court set the standard for entry into residences based upon an arrest warrant in *Payton* v. *New York*, 445 U.S. 573, 100 S.Ct. 1371, 63 L.Ed.2d 639 (1980), where the Court stated: "[F]or Fourth Amendment purposes, an arrest warrant founded on probable cause implicitly carries with it the limited authority to enter a dwelling in which the suspect lives when there is *reason to believe the suspect is within*." *Id.* at 603, 100 S.Ct. at 1388 (emphasis added). *Payton* thus requires a two-part inquiry: first, there must be a reasonable belief that the location to be searched is the suspect's dwelling, and second, the police must have "reason to believe" that the suspect is within the dwelling. In this case, police had a valid arrest warrant for Magluta, and thus were privileged to enter 98 East La Gorce if they had reason to believe it was Magluta's residence, and if they had reason to believe that Magluta was home at the time of entry. As noted above, although the magistrate judge found that the government had sufficient information to believe that Magluta resided at 98 East La Gorce, he held that the evidence was insufficient to establish that Magluta was at home at the time of the entry. Therefore, he granted the motion to suppress.[9]

[9] The magistrate judge thus bypassed defining the *Payton* standard by holding that there was a sufficient quantum of evidence that 98 East La Gorce was Magluta's

The parties disagree as to the meaning of *Payton*'s "reason to believe" test. Magluta argues that the *Payton* standard is the functional equivalent of probable cause; the government contends that the standard embodies a lesser degree of certainty than probable cause.

The "reason to believe" standard was not defined in *Payton*, and since *Payton*, neither the Supreme Court, nor the courts of appeals have provided much illumination. *See, e.g., United States* v. *De Parias*, 805 F.2d 1447, 1457 (11th Cir. 1986) (applying *Payton* without defining "reason to believe"), *cert. denied*, 482 U.S. 916, 107 S.Ct. 3189, 96 L.Ed.2d 678 (1987). Consequently, the parties have been forced to assert somewhat strained rationales for their respective interpretations. Magluta noted that it was not argued in *Payton* that the police lacked probable cause to believe the suspect was home, *Payton*, 445 U.T. at 582-83, 100 S.Ct. at 1378; and that the dissent in *Payton* treated the majority opinion as if it required a showing of probable cause that the suspect was at home. *See Payton*, 445 U.S. at 580-81 n.13, 100 S.Ct. at 1395 n.13 (White, J., dissenting). He also directs our attention to the Supreme Court's language in *Maryland* v. *Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), in which the Court addressed the permissible scope of a protective sweep incident to arrest. In *Buie*, the Court explained that "[p]ossessing an arrest warrant and *probable cause to believe he was in his home*, the officers were entitled to enter and to search anywhere in the house in which Buie might be found." *Id.* at 332-33, 110 S.Ct. at 1097 (emphasis added).

Nevertheless. the Court's language in *Buie* is not dispositive, because the Court there merely reasoned that based on the facts of *Buie* the police officers' possession of probable cause

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residence to satisfy both a probable cause and a lesser "reason to believe" standard, but that there was insufficient evidence to support the conclusion that Magluta was at home under either standard.

entitled them to enter and sweep the residence — the Court did not and has not, ever held that probable cause is *required* to enter a residence to execute an arrest warrant for the resident.

On the other hand, the government has failed to cite a single case in which the *Payton* standard has been defined as embodying less than probable cause. In fact, at oral argument, government's counsel even referred to the applicable standard as "quasi-probable cause." The strongest support for a lesser burden than probable cause remains the text of *Payton*, and what we must assume was a conscious effort on the part of the Supreme Court in choosing the verbal formulation of "reason to believe" over that of "probable cause." *Cf.* 2 Wayne R. LaFave, *Search and Seizure* § 6.1(a) at 565, 567 (1987) (opining that standard may have been enunciated as it was in *Payton* "so as not to encourage lower courts to adopt a hardnosed 'probable cause to believe the suspect is at home' test," but still arguing that "on balance it seems preferable to insist upon probable cause").

Prior to *Payton*, this circuit's predecessor recognized the right to enter a residence to execute an arrest warrant. *See United States* v. *Woods*, 560 F.2d 660, 665 (5th Cir. 1977) (collecting cases), *cert. denied*, 435 U.S. 906, 98 S.Ct. 1452, 55 L.Ed.2d 497 (1978). Like the *Payton* court, the former Fifth Circuit permitted such entry upon reasonable belief. As the *Woods* court summarized:

> The test is properly framed in terms of reasonable belief. Probable cause is essentially a concept of reasonableness, but it has become a term of art in that it must always be determined by a magistrate unless exigent circumstances excuse a warrant. . . . Reasonable belief embodies the same standards of reasonableness but allows the officer, who has already been to the magistrate to secure an arrest war-

> rant, to determine that the suspect is probably within certain premises without an additional trip to the magistrate.

Id. (quoting *United States* v. *Cravero*, 545 F.2d 406, 421 (5th Cir. 1976).[10] Hence, we must view the evidence in this case in light of the recognition that probable cause itself is a doctrine of reasonable probability and not certainty. *See Hill* v. *California*, 401 U.S. 797, 804, 91 S.Ct. 1106, 1110-11, 28 L.Ed.2d 484 (1971) ("[S]ufficient probability, not certainty, is the touchstone of reasonableness under the Fourth Amendment. . . ."); *see also United States* v. *Allison*, 953 F.2d 1346, 1350 (11th Cir. 1992) ("Probable cause exists where the facts and circumstances within an officer's knowledge and of which he had reasonably trustworthy information are sufficient to warrant a person of reasonable belief that an offense has been or is being committed by the person to be arrested."); *United States* v. *Gonzalez*, 969 F.2d 999, 1002-03 (11th Cir. 1992) (employing similar definition of probable cause, and noting that observations and experiences of law enforcement agents may be weighed in the totality of circumstances that might create probable cause for an arrest).

[2, 3] Due to the lack of authority on point, it is difficult to define the *Payton* "reason to believe" standard, or to compare the quantum or proof the standard requires with the proof that probable cause requires. We think it sufficient to hold that in order for law enforcement officials to enter a residence to execute an arrest warrant for a resident of the premises, the facts and circumstances within the knowledge of the law enforcement agents, when viewed in the totality, must warrant a reasonable belief that the location to be searched is the sus-

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[10] Decisions of the former Fifth Circuit rendered prior to October 1, 1981, are circuit precedent in the Eleventh Circuit. *Bonner* v. *City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

pect's dwelling, and that the suspect is within the residence at the time of entry. The magistrate judge held, and we agree, that the evidence supported the marshals' reasonable belief that 98 East La Gorce was Magluta's residence. In evaluating this on the spot determination, as to the second *Payton* prong, courts must be sensitive to common sense factors indicating a resident's presence. For example, officers may take into consideration the possibility that the resident may be aware that police are attempting to ascertain whether or not the resident is at home,[11] and officers may presume that a person is at home at certain times of the day — a presumption which can be rebutted by contrary evidence regarding the suspect's known schedule.

This circuit's case law supports this practical interpretation of *Payton*. In *United States* v. *Beck*, 729 F.2d 1329, 1331-32 (11th Cir.), *cert. denied*, 469 U.S. 981, 105 S.Ct. 383, 83 L.Ed.2d 318 (1984), this court held that FBI officers and local police had reason to believe that Beck was in his apartment when the officers entered it to execute an arrest warrant. In *Beck*, there were no outward signs of life in the apartment the evening before the search or the next morning, and as the agents had not monitored Beck's apartment, they were not aware of his comings and goings. Despite these evidentiary shortcomings, the *Beck* court observed that Beck's car was parked near the home, and that it was reasonable to believe that a person would be home sleeping at 7:30 A.M., which

[11] Although LaFave argues in favor of the probable cause standard, he contends that this standard should be applied with common sense, so that "the police need not possess 'special knowledge' that the defendant is at home in order to meet the probable cause test, for in the absence of facts tending to show that the defendant is not at home it is reasonable to infer that he would be there. . . . [I]f the defendant's quarters are dark and no sounds or movements can be detected within and no one answers the door, the other facts and circumstances (*e.g.*, nature of the crime, crime recently committed, defendant's car parked nearby) may nonetheless support the inference that the defendant is concealing himself therein." *See* 2 Wayne R. LaFave, *Search and Seizure* § 6.1(a) at 568 (1987).

would account for the lack of outward signs of life. Finally, the court noted that the lack of response to the officer's knock and announcement did not indicate that no one was at home "since it was reasonable to expect a fugitive to hide or flee if possible." *Id.* at 1332; *see also De Parias*, 805 F.2d at 1457 (holding that the district court did not clearly err by determining that agents reasonably believed that the suspects were at home, where the apartment manager informed agents that the De Pariases were at home if a certain car was parked in front of the apartment).

The former Fifth Circuit applied similar reasoning in *Woods*:

> Although there is no indication in the record that the officers had reason to know whether appellant would be at his home when they went there to execute the arrest warrant, we find it reasonable anticipation on the officers' part to believe that a person would be at his place of abode, especially at 8:30 in the morning for a man not known to be working. . . .

Woods, 560 F.2d at 665. Other courts similarly have employed a common sense approach to reviewing these determinations. *See, e.g., United States* v. *Terry*, 702 F.2d 299, 319 (2d Cir.) (sufficient evidence to believe Terry was at the residence where a 12-year-old boy outside of the residence, wearing a shirt with the name "Terry" on it, stated that his father and mother lived at the residence and did not indicate that his father was not at home, and further, at 8:45 A.M. on a Sunday morning it would be reasonable to assume Terry was at home), *cert. denied*, 461 U.S. 931, 103 S.Ct. 2095, 77 L.Ed.2d 304 (1983) and 464 U.S. 992, 104 S.Ct. 482, 78 L.Ed.2d 680 (1983); *United States* v. *Litteral*, 910 F.2d 547, 553-54 (9th Cir. 1990) (belief reasonable when informant told agents that if Litteral's car was at the property, he would be there); *United States* v.

Morehead, 959 F.2d 1489, 1496 (10th Cir. 1992) (officers knew that the person resided at the house, and the presence of a car in the carport and a truck in front of the house provided reason to believe that he was on the premises). *reh'g en banc sub nom., United States* v. *Hill*, 971 F.2d 1462 (10th Cir. 1992) (en banc) (affirmed on other grounds).

III.

Having set forth the appropriate inquiry under *Payton*, we must determine the proper standard of review. The parties dispute the level of deference this court should accord the magistrate judge's determination that the police lacked a sufficient basis for concluding that Magluta was at home at the time of the entry in 98 East La Gorce.[12]

[4] Because rulings on motions to suppress involve mixed questions of fact and law, we review the district court's factual findings for clear error, and its applications of the law to the facts *de novo*. *United States* v. *Ramos*, 12 F.3d 1019, 1022 (11th Cir. 1994); *United States* v. *Diaz-Lizaraza*, 981 F.2d 1216, 1220 (11th Cir. 1993). Further, when considering a ruling on a motion to suppress, all facts are construed in the light most favorable to the prevailing party below. *United States* v. *Behety*, 32 F.3d 503, 510 (11th Cir. 1994).

[5] The mere incantation of this oft-repeated standard does not end our inquiry; we must decide whether the magistrate judge's holding that the police did not have reason to believe that Magluta was home at the time of the marshals' entry should be treated as a factual finding reviewed for clear error, as Magluta urges, or as a legal conclusion reviewed *de novo*, as the government requests. In framing this inquiry, we note that the magistrate judge did not conclude that *these* particular

[12] As explained above, the magistrate judge's report and recommendation was "ratified, affirmed and approved in its entirety" by the district court.

U.S. marshals did not believe that Magluta was home; such a conclusion would clearly involve evaluating the reliability of the marshals' testimony to determine whether they did indeed possess such a subjective belief. Rather, the magistrate judge weighed the factual evidence and engaged in an objective inquiry as to whether the facts at the time of the entry should have given the marshals "reason to believe" that Magluta was at home.

In *United States* v. *Tobin*, 923 F.2d 1506 (11th Cir.) (en banc), *cert. denied*, 502 U.S. 907, 112 S.Ct. 299, 116 L.Ed.2d 243 (1991), this court addressed the warrantless search of a residence based upon a combination of probable cause and exigent circumstances. Like the execution of the arrest warrant here, the probable cause determination in cases such as *Tobin* is made, in the first instance, by the police officers on the scene, not by a neutral and detached magistrate. In *Tobin*, the court unequivocally stated: "The question of what amounts to 'probable cause is purely a question of law and is subject to plenary review by this court.'" *Id.* at 1510 (quoting *United States* v. *Hurtado*, 779 F.2d 1467, 1477 (11th Cir. 1985)); *see also Allison*, 953 F.2d at 1349-51 (reviewing *de novo* DEA agents' determination that they possessed probable cause to arrest suspect). *Tobin* thus removed any doubt as to the standard of review for an officer's probable cause determination.[13] We can divine no rational reason for applying a different standard of review for the probable cause determinations officers made on the scene in *Tobin* and *Allison*, and the determination the law enforcement agents made on the scene in this case. We therefore hold that the magistrate judge's conclusion that the marshals did not have reason to believe that Magluta was at

[13] Magluta directs our attention to *United States* v. *Edmondson*, 791 F.2d 1512, 1515 (11th Cir. 1986), in which a panel of this court upheld the clearly erroneous standard of review to a district court's finding that FBI agents possessed probable cause for arresting a suspect. However, it is unlikely that the *Edmondson* court's application of the clearly erroneous standard survives *Tobin*.

home, was a legal determination and not a factual finding.[14] Thus, we will review *de novo* the magistrate judge's holding, adopted in full by the district court, that the police did not have reason to believe that Magluta was at home at the time of the entry.[15] *See Cumbie* v. *Singletary*, 991 F.2d 715, 719 (11th Cir.), *cert. denied*, ___ U.S. ___, 114 S.Ct. 650, 126 L.Ed.2d 608 (1993) (magistrate judge's conclusions of law as adopted by district court reviewed *de novo*).

IV.

[6] The evidence before the magistrate judge included Braynon's testimony that: (1) information from Luis Mendez, a co-defendant in the instant case, via a confidential informant, described Lorenzo as Magluta's friend and drug associate, and as a frequent visitor to the residence; (2) the afternoon guard identified Lorenzo as a person who frequented the residence; (3) during his early morning drive-through, Braynon saw a gold Honda, a white Astro van, and other vehicles parked outside of the residence; (4) the lawn was manicured and a porch light was on when he drove by; and (5) the afternoon guard said that a photograph of Magluta resembled the home renter and that the person who resembled the man in the photo drove a white Astro van. There was also evidence that: the white Astro van did not depart during the entire day; the gold Honda left the island at approximately 12:30 P.M. with a driver resembling Lorenzo, and returned at approximately 5:30 P.M.

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[14] There are cases involving motions to suppress that turn on the resolution of narrow disputed factual findings, which are properly reviewed for clear error. *See, e.g., United States* v. *Cure*, 996 F.2d 1136, 1137-38 (11th Cir. 1993) (stop of car not pretextual due to factual finding that officer stopped vehicle because it was driving without headlights), *cert. denied*, ___ U.S. ___, 114 S.Ct. 1075, 127 L.Ed.2d 393 (1994). In our view, this case does not present such a situation.

[15] In *De Parias*, 805 F.2d at 1457, this court reviewed the district court's determination that police had reason to believe the suspect was at home under the clearly erroneous standard; the *De Parias* court, however, did not elaborate on why it felt that the clear error standard was appropriate in that case. In light of *Tobin*, which was decided *en banc*, subsequent to *De Parias*, we feel compelled to apply a different standard of review than the *De Parias* panel.

driven by a man positively identified as Lorenzo; and the Honda was then seen parked at 98 East La Gorce.

The most important dispute in the evidence arises from the testimony of Vaccaro, the afternoon guard, that he did not identify the photograph of Magluta as being the resident of the premises, and that he did not relate to Braynon any connection between the white Astro van and Magluta. To the contrary, Vaccaro described the driver of the white van and testified that Magluta did not resemble the driver.[16]

A review of the evidence available to the marshals at the time of the entry into 98 East La Gorce, viewed in the totality of the circumstances, leads us to conclude that the facts supported the marshals' reasonable belief that Magluta was at home at the time of the entry — despite possible inferences to the contrary.[17]

First, it is uncontroverted that Lorenzo was a frequent visitor to the residence, and there is no doubt that Lorenzo was at

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[16] The government argues that the magistrate judge's finding that there was probable cause to believe that Magluta resided in the house, based in part on Braynon's testimony, represents an implicit determination by the magistrate judge that Braynon was more credible than the guard. Although credibility determinations are for the factfinder and should not be tampered with on appeal, *see United States v. Copeland*, 20 F.3d 412, 413 (11th Cir. 1994), the fact that the magistrate judge relied on Braynon's testimony to the extent that it supported the notion that Magluta resided at 98 East La Gorce, does not, without more, indicate that the magistrate judge fully discredited the afternoon guard's testimony. Accordingly, Braynon's testimony must be weighed in the *Payton* analysis, taking this dispute into consideration.

[17] For example, Magluta asserts that the time of day the entry occurred, around 6:00 P.M., does not readily support the conclusion that Magluta was at home, as it did in *Beck*, *Terry* and *Woods*, which involved early morning raids; the actual source of information in this case was Mendez, a man who was not known to be reliable; little information was given about Magluta's current comings and goings; Braynon's drive-through only proved that *someone* lived at the residence; and ownership of the vehicles was not ascertained. Also, evidence was presented that the morning guard did not recognize Magluta's photo at all, neither guard was asked when Magluta was last seen, and even by Braynon's own testimony, the afternoon guard only saw a resemblance between the photo and the occupant of 98 East La Gorce.

the home at the time of entry; he was positively identified returning to the island, and his vehicle was spotted outside the residence. Moreover, the magistrate judge held that the evidence supported the conclusion that Magluta resided at 98 East La Gorce. It is reasonable and logical for the marshals to have inferred that Lorenzo was at 98 East La Gorce visiting the resident of the premises, Magluta — especially as the two men were friends and associates. The presence of a visitor at a residence supports the reasonable conclusion that the resident is at home.

Other evidence involves the connection of Magluta to the white Chevrolet Astro van. The presence of a vehicle connected to a suspect is sufficient to create the inference that the suspect is at home. *See Beck*, 729 F.2d at 1331-32; *De Parias*, 805 F.2d at 1457; *Litteral*, 910 F.2d at 553-54. It is undisputed that the van did not depart from the premises during the entire period of surveillance. Because the magistrate judge did not discredit Braynon's testimony concerning the van to Magluta, the presence of the van contributes to the reasonableness of the marshals' belief that Magluta was at home.

There was also evidence that the residence was lived in: the lawn was manicured and a porch light was on during Braynon's drive-through. While this in and of itself would not demonstrate that Magluta was at home at the time of entry, it is fair to consider this fact, as there was no indication that Magluta departed, such as for work or the like.

Finally, the officers were entitled to consider that Magluta was a fugitive from justice, wanted on a 24 count drug trafficking indictment, who might have been concealing his presence. This could explain why the marshals never saw Magluta during their observation, and why he might not have been spotted previously. Hence, the lack of direct evidence that Magluta had been seen that day does not eviscerate the marshals' reasonable conclusion that he was at home.

Neither *Payton* nor this court's Fourth Amendment jurisprudence requires law enforcement officers to be absolutely certain that a suspect is at home before entering a residence to execute an arrest warrant. Accordingly, we hold that the evidence available to the marshals at the time they entered the residence to execute the arrest warrants reasonably supported the conclusion that Magluta was at home at that time.

[7, 8] Once the marshals possessed this valid justification to enter the residence they were entitled, pursuant to *Maryland* v. *Buie*, 494 U.S. 325, 110 S.Ct. 1093, 108 L.Ed.2d 276 (1990), to engage in a protective sweep of the premises. Any evidence discovered in plain view during the sweep was properly used to secure a search warrant for the premises. *Cf. Tobin*, 932 F.2d at 1513 (evidence seen during protective sweep may be seized).

Based upon the foregoing discussion, we REVERSE the district court's order granting Magluta's motion to suppress and REMAND for proceedings consistent with this opinion.[18]

REVERSED and REMANDED.

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[18] Because we reverse the district court's grant of the motion to suppress on the grounds discussed above, it is unnecessary for us to determine whether the district court erred by precluding the government from presenting evidence related to the applicability of the inevitable discovery and independent source doctrines, and by holding that these exceptions do not apply to this case.

APPENDIX B

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 93-5069

UNITED STATES OF AMERICA,
Plaintiff-Appellant,

v.

SALVADOR MAGLUTA, a/k/a Sal, a/k/a Santiago Menendez, a/k/a Angelo Maretto,
Defendant-Appellee.

On Appeal from the United States District Court for the Southern District of Florida

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Before: KRAVITCH and HATCHETT, Circuit Judges, and CLARK, Senior Circuit Judge.

PER CURIAM:

(X) The Petition(s) for Rehearing are DENIED and no member of this panel nor other Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestions(s) of Rehearing En Banc are DENIED.

( ) The Petition(s) for Rehearing are DENIED and the Court having been polled at the request of one of the members of the Court and a majority of the Circuit Judges who are in regular active service not having voted in favor of it (Rule 35, Federal Rules of Appellate Procedure; Eleventh Circuit Rule 35-5), the Suggestion(s) of Rehearing En Banc are also DENIED.

( ) A member of the Court in active service having requested a poll on the reconsideration of this cause en banc, and a majority of the judges in active service not having voted in favor of it, Rehearing En Banc is DENIED.

ENTERED FOR THE COURT:

_____

UNITED STATES CIRCUIT JUDGE

Supreme Court, U.S.
FILED
95 200 JUL 28 1995
OFFICE OF THE CLERK

No.

In the Supreme Court of the United States

OCTOBER TERM, 1995

SALVADOR MAGLUTA,
PETITIONER,

v.

UNITED STATES OF AMERICA,
RESPONDENT.

PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR
THE ELEVENTH CIRCUIT

SUPPLEMENTAL APPENDIX TO PETITION FOR WRIT OF CERTIORARI

KIMBERLY HOMAN
SHEKETOFF & HOMAN
84 State Street
Boston, Massachusetts 02109
(617) 367-3449

MARTIN G. WEINBERG
OTERI, WEINBERG & LAWSON
The Statler Building
20 Park Plaza
Suite 905
Boston, Massachusetts 02116
(617) 227-3700

Counsel of Record

ROY BLACK, P.A.
201 S. Biscayne Blvd.
Suite 1300
Miami, Florida 33131
(305) 371-6421

BATEMAN & SLADE, INC. BOSTON, MASSACHUSETTS

21pp

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SUPPLEMENTAL APPENDIX.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-6060 CR MORENO

UNITED STATES OF AMERICA,
Plaintiff,

v.

SALVADOR MAGLUTA, ORLANDO LORENZO and AUGUSTO FALCON,
Defendants.

REPORT AND RECOMMENDATION

This cause is before this court on the Motion to Suppress Evidence Seized in Searches Conducted on or about October 15, 1991 filed by Defendants Salvador Magluta, Orlando Lorenzo and Augusto Falcon pursuant to an order of reference entered by the Honorable Ferderico A. Moreno, United States District Judge.

This court has reviewed the motion, the response by the government, the reply and the file in this case. An evidentiary hearing was held on this motion beginning on June 14, 1993. The transcript of the hearing has been filed with this court (D.E. #479-84) and is incorporated herein as part of this report and recommendation.

DISCUSSION

The Defendants' Motion to Suppress involves the entry into, and searches of, homes at 98 East La Gorce Circle, Miami Beach and at 1247 Seminole Drive, Fort Lauderdale. Each of

these homes was entered for the purpose of executing arrest warrants for the defendants.

On August 20, 1992, this court entered an order finding that the Defendants had standing to challenge the searches of the two homes[1] and that the affidavits for the search warrants describe the items to be seized with sufficient particularity. This court also made a preliminary determination that the affidavits contained sufficient probable cause. However, as noted in the order, this finding was based in part on material provided by the challenged initial entries into the residences.[2] Thus, a final determination or probable cause will be made below.

While much argument and evidence was presented to this court on this motion, the defendants' argument focuses on two main issues: (1) Whether the entries into the residences, under the authority of the arrest warrants, were proper and, if so, (2) Whether the agents exceeded the scope of a permissible search incident to the entries.

I. 98 EAST LA GORCE CIRCLE

The entry into the La Gorce home resulted in the arrest of Defendants Salvador Magluta and Orlando Lorenzo. Additionally, several items of contraband, including a box of currency, were found in the home. The discovery of these items was set out as part of an affidavit in support of a subsequent search warrant for the premises.

The focus of the argument in support of suppression of the items seized from this property is the claim by the Defendants that the agents lacked sufficient probable cause to believe that Magluta was a resident of the home and that he was on the prem-

[1] As discussed at the hearing on this matter, there is no dispute by the Defendants that Defendants Magluta and Lorenzo only maintain standing as to the La Gorce residence, while Falcon only has standing as to the Fort Lauderdale residence. (T. 7-134).

[2] This order is hereby incorporated into this report and recommendation.

ises at the time the arrest warrants were executed. Additionally, the Defendants contend that the agents exceeded the permissible scope of the search, particularly in the seizure of a box of currency from a guest house.

A. ENTRY INTO THE PREMISES

The entry into the La Gorce residence was under the authority of an arrest warrant for Salvador Magluta. The defendants contend that there was insufficient evidence for the government to believe that the residence was Magluta's and that he was in the residence at the time.

The evidence relied on by the government to show Magluta's connection with the property came from several government agents. Deputy Marshal Keith Braynon testified that he received information on October 13, 1991 from a reliable informant, who was in custody, as to the location of a residence for Magluta and Lorenzo. This source obtained the information from a co-defendant in this case, Luis Mendez. (T. 1-25).[3] The information passed to Braynon consisted of a map which he testified showed the location of the home at 98 La Gorce Circle.[4] The home was identified as belonging to Magluta, and the agent was also informed that Lorenzo was a frequent visitor. (T. 1-26). The source also indicated that Mendez had last been at the residence just prior to his September 19, 1991 arrest.

Braynon testified that he went to the residence two days after getting the information, at approximately 6:00 A.M. on October 15, 1991, and took a drive through the circular driveway between the main house and a smaller guest house. Braynon observed a large motorhome, a gold Honda, a gray Pathfin-

[3] All references are to the transcript volume and page.

[4] The map was not in existence at the time of the hearing and had not been produced to the Defendants.

der and a White Chevy Astro van parked on the premises. (T. 1-29). Braynon later returned with other agents to conduct surveillance of the property. During the surveillance, Braynon saw the gold Honda previously observed at the residence leave the island occupied by someone he stated appeared to be Lorenzo.

Braynon spoke with the afternoon guard on the island, and showed him a photograph of Lorenzo and one of Magluta. According to Braynon, the guard positively identified Lorenzo as "frequenting the residence." He also testified that the guard could not positively identify Magluta, but the guard stated that the photo resembles a person who lives at the residence. (T. 1-32). Braynon testified that the guard also indicated that a person who looks similar to Magluta drove a white Chevy Astro van. (T. 1-33).[5] Braynon stated that the Astro van he had seen at the residence that morning had not departed the residence during the surveillance. Braynon also testified that nobody every directly saw or identified Magluta at the residence. (T. 1-70).

Braynon testified that the gold Honda returned to the island at approximately 5:00 P.M. When the car stopped at the gate house, Braynon saw the occupant, whom he identified as Lorenzo. Braynon said that the gate was up when the car drove through, but the vehicle slowed down as it entered. (T. 1-125). The guard also identified Lorenzo. After meeting with other officers, entry to the residence was made at approximately 6:00 P.M.

According to Braynon, the agents were concerned about running out of daylight and bad weather after observing the gold Honda return. At that point, Braynon testified that he felt

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[5] In the government's response to the Motion to Suppress it stated (p. 3) that the afternoon guard identified the gray Pathfinder as the vehicle driven by the resident. Portions of the government's response were admitted into evidence as admissions against interest.

he had a good location for Lorenzo. (T. 1-138). Braynon also pointed to the relationship between Magluta and Lorenzo, the guard's tentative identification of Magluta, and the information from Mendez as indicating that the residence was Magluta's. (T. 1-138, 139).

Marshal Sean Conboy agreed that the location of the residence was based on the map given by the informant, and that the agents did not know who owned the Astro van or when it was last driven. (T. 2-90-91). Conboy testified that the belief that Magluta was in the residence came from the informant's information, the identification of the driver of the van and Lorenzo's presence. (T. 2-97).

Conboy also stated that, when the patrol car pulled into the driveway, there were four males standing in front of the residence. Immediately, one of the males, matching the description of Lorenzo, went inside the house. (T. 2-15). Conboy testified that the individual later captured and identified as Lorenzo was the same person who ran into the house initially. (T. 2-19). He added that, when he saw him run in he did not know it was Lorenzo, only that it was somebody that matched his description. (T. 2-104). After the officers shot tear gas into the residence and entered, Lorenzo was captured within minutes as he came from the upstairs to the lower floor. Magluta made an exit from the home, and was ultimately captured with the assistance of a police dog after he had hidden in some bushes.[6]

The defendant presented testimony from Michael Vaccaro, the afternoon security guard at La Gorce. He testified that the only identification made was of Lorenzo, and that he did not recall giving the description of the driver of the Astro van. Vac-

[6] The government asserted that Magluta's exit from the premises constituted an abandonment of the contents, and thus precludes raising any arguments for suppression. As noted in this court's order of August 20, 1992 and after discussion at the hearing, the government's argument is rejected.

caro also testified that Lorenzo returned to the island driving a sand colored BMW. According to Vaccaro, the entry gate was down, and Lorenzo's car stopped prior to it being opened. (T. 1-156). Vaccaro returned to the stand three days after this testimony and stated that he had recalled that Lorenzo had driven a silver Honda for a short time. (T. 4-62). Vaccaro also testified that he never told any government agent that the driver of the Astro van was a resident or renter at 98 La Gorce. (T. 4-63). He also testified that he never saw Magluta driving the Astro van. (T. 4-64), and described the driver as a very heavy-set man with glasses.

Michael Lorenzo, the morning guard at La Gorce testified that he identified a photo of Orlando Lorenzo but did not identify anyone else to the officers and did not talk about the activities at the residence or the drivers of the vehicles. (T. 1-286).

Further testimony concerning Lorenzo's vehicle came from defense witness Anthony Grant who testified that he played basketball with Lorenzo in the summer and fall of 1991. Grant stated that Lorenzo drove a Honda Accord and a BMW. (T. 4-82).

An arrest warrant founded on probable cause carries with it the "limited authority to enter a dwelling in which the suspect lives when there is reason to believe the suspect is within." *Payton* v. *New York*, 445 U.S. 573, 603, 100 S.Ct. 1371, 1388, 63 L.Ed.2d 639 (1980). In *Steagald* v. *United States*, 451 U.S. 204, 213, 101 S.Ct. 1642, 1648, 68 L.Ed.2d 38 (1981), the Court held that a search warrant is required for the execution of an arrest warrant in the home of a third party.

Defendants Magluta and Lorenzo contend that the government has failed to meet the burden to show that the marshals had reasons to believe that Magluta resided at 98 La Gorce and that he was present at the time the warrant was executed. According to the Defendants, the government must meet this

showing by "probable cause." The government responds that only a "reasonably articulable suspicion" is required. Neither side is able to cite to a definitive case on this matter, and none has been found by this court. However, in *Steagald*, the Court twice referred to "probable cause" in discussing the officer's belief that the subject of the arrest warrant was in the premises. As noted by the Court in footnote 7, "Specifically, absent exigent circumstances, the magistrate, rather than the police officer, must make the decision that probable cause exists to believe that the person or object to be seized is within a particular place." 451 U.S. at 214, n.7; *see also, id.* at 211, n.6.

This court finds that, even under the probable cause standard, the government had sufficient information to believe that Magluta resided at 98 La Gorce. The information supplied by Mendez, via the map, was corroborated in part by the identification of Lorenzo at the home, as well as the tentative identification of Magluta by the guard, as testified to by Marshal Braynon.

A much closer question is presented by the evidence on the issue of whether Magluta was in the residence at the time the entry occurred. The evidence presented to this court, as outlined above, shows cause to believe that Magluta resided at the property. However, there was no evidence that he was seen there that day, or even anytime within one month of the search. The presence of Lorenzo at the residence does not show that Magluta was also there, and the fact that Magluta may be connected to the Astro van is of little import since no one had seen Magluta in the house for at least one month. Additionally, there was no evidence as to the time frame that Magluta actually last drove the vehicle. This court finds insufficient evidence was presented to meet either the reasonable suspicion or probable cause standard. Furthermore, since the evidence obtained in the search of the property provided the probable cause for the issuance of the subsequent search war-

rant, that warrant cannot be upheld on the basis of the independent source doctrine. *See, Murray* v. *United States*, 487 U.S. 533, 108 S.Ct. 2529, 101 L.Ed.2d 472 (1988).

The government also attempts to rely on exigency and hot pursuit to allow for entry into the premises. Both arguments must fail. The "hot pursuit" alleged for Lorenzo is not supported by the evidence which shows that, while someone went into the residence from outside when the police entered, no positive identification of Lorenzo was made at that time. Furthermore, the government relies on the fact that Lorenzo allegedly ran out of the back door and was chased back into the home to support this argument. However, the evidence presented to this court is that just prior to the entry, a male had run out of the back of the home, been confronted, and returned to the residence. (T. 2-19). There was no testimony that this man was in fact Lorenzo. Additionally, the marine unit did not follow the man inside the residence, rather, the officers in front continued with their planned entry. Lorenzo was ultimately captured in the home as he came down from an upstairs bedroom. This was not a situation involving a fleeing felon who had just committed an offense in front of an officer, but rather, some unidentified person going into a residence. Additionally, this court notes that Lorenzo was not in fact followed in from the front, but rather, the police went according to the procedures they had planned prior to seeing the individual reenter the premises.

Similarly, the exigency argument must fail based on the facts presented to this court which show that any exigent circumstances were created by the conduct of the agents in approaching the residence for entry. There has been no evidence presented to this court to show that surveillance could not have been maintained of the home while a search warrant, based on the presence of the fugitives in the residence, was obtained. Additionally, there has been no showing that the occupants of

the residence knew of the agents' presence at La Gorce. Finally, the testimony presented to this court was that the agents entered due to poor weather and nightfall rather than the fear of escape. Even if this somehow supported a claim of exigency, that argument must fail. The agents were in close proximity to the premises since 6:00 A.M. the day of the search. If they had probable cause to believe Magluta was on the premises (which they did not), their choice to wait and see if the person resembling Lorenzo would return cannot be used to create an exigent situation.

The government also asserts that the good faith doctrine of *United States* v. *Leon*, 468 U.S. 897, 104 S.Ct. 3405, 82 L.Ed.2d 677 (1984) applies to allow for the admission of the evidence from the residence. This argument is misplaced. The *Leon* good faith exception applies to errors in the preparation of a warrant, not in the execution of an otherwise valid warrant. *United States* v. *Medlin*, 798 F.2d 407 (10th Cir. 1986). As specifically noted in *Leon*, the Court's discussion "assumes, of course, that the officers properly executed the warrant and searched only those places and for those objects that it was reasonable to believe were covered by the warrant." *Id.* at 918, n.19.

In the present case, the challenge by the defendants is to the execution of the arrest warrant, not as to whether there was probable cause for the warrant in the first instance. As noted, the arrest warrant did not have a specific address, and the execution of the warrant at La Gorce was the decision of law enforcement, and not that made by a neutral and detached magistrate. Thus, the good faith doctrine is inapplicable.

B. SCOPE OF THE SEARCH INCIDENT TO THE ENTRY

If the District Court determines that the entry was in fact proper, the next issue facing the court is whether the agents exceeded the law in the extent of their search. Even though the

items found in the residence were ultimately seized with a warrant, if the information relied on to establish probable cause for the warrant was improperly discovered, it cannot be considered.

Marshal Braynon testified that no one other than the initial team entered the home prior to the search warrant, due to the strong presence of tear gas. Inspector Michael Cameron of the Marshals Service testified that the search of the residence included any space where someone could hide, including kitchen cabinets, closets and piles of clothing. (T. 1-191-93). As the search continued, the gas went to the upstairs area, which led to Lorenzo's surrender. Cameron testified that the irritant was still very strong when he left the premises at 9:00 P.M. and that no one had gone in to conduct a search. (T. 1-201).

David Hiebert of the Marshals Service testified that, after the gas was dispersed in the residence, the agents moved slowly throughout the home searching for suspects. (T. 3-138). Hiebert stated that, while searching one of the closets he noticed a lot of space behind a clothes hamper. According to Hiebert, there was enough room for someone to hide behind the hamper and the clothes hanging over it. When Hiebert kicked the hamper over, clothes came out in addition to two nylon gym bags. (T. 3-142). Hiebert also observed what he described as a "well equipped office" including a fax machine and a floor safe. (T. 3-144). Hiebert also testified that it was the routine and practice of his team to search all areas of a residence when entry is made. (T. 3-173).

An issue also arose during the hearing concerning a box of currency found in a closet in the guest house by Miami Beach Police Officer Charles Seraydar. Seraydar testified he searched the guest house at the time the warrants were executed. No one was found in the home, but Seraydar discovered a closet door locked with a deadbolt, but with a light on inside. Seraydar stated that he was concerned that someone could be concealed

inside the closet, so the police removed the hinge pins and the door. (T. 1-259). The closet was described as 3-feet deep and approximately 5-feet wide. When he entered the closet, Seraydar noticed a piece of carpet raised over a large box. The carpet was 18 inches off the floor, 2- to 3-feet long and 2- to 3-feet wide. (T. 1-261). Seraydar said he leaned over, stepped on the carpet and noticed the box. A corner of the box was in sight, and two bundles of $20 bills, each 12- to 13-inches high, were exposed. (T. 1-262). Seraydar pulled the carpet off, picked up the box and gave it to another agent. (T. 1-264). He estimated that the total time from entry into the residence to finding the box was three to five minutes. (T. 1-281).

The defendants contend that the search of the residence exceeded that allowed for the execution of the warrants, and thus, any evidence observed during the sweep should be excluded in determining whether the search warrant affidavit is supported by probable cause. The government argues that the entry and observations were permissible based on the protective sweep doctrine.

A protective sweep is permissible in conjunction with an in-home arrest if the searching officer possess a reasonable belief, based on specific and articulable facts, that an individual posing a danger to those on the scene is in the area to be swept. *Maryland* v. *Buie*, 494 U.S. 325, 335-38, 110 S.Ct. 1093, 1099-1100, 108 L.Ed.2d 276 (1990). The Court in *Buie* defined a protective sweep as "a quick and limited search of a premises . . . narrowly confined to a cursory visual inspection of those places in which a person might be hiding." 494 U.S. at 327, 110 S.Ct. at 1094; *United States* v. *Diaz-Garcia*, 808 F.Supp. 784 (S.D. Fla. 1992).

Any evidence discovered in plain view during the proper scope of a protective sweep may also be seized. *United States* v. *Tobin*, 923 F.2d 1506, 1513 (11th Cir. 1991). Three basic conditions must be met to justify a plain view seizure. First, the

officer must not violate the Fourth Amendment in arriving at the place from which the incriminating evidence can be plainly viewed. Second, the incriminating character of the evidence must be immediately apparent. Finally, the officer must have a lawful right of access to the object itself. *Horton* v. *California*, 496 U.S. 128, 110 S.Ct. 2301, 110 L.Ed.2d 112 (1990).

To invoke the plain view doctrine, the officers must have probable cause to believe that the item viewed is evidence of a crime or is contraband. *Arizona* v. *Hicks*, 480 U.S. 321, 107 S.Ct. 1149, 94 L.Ed.2d 347 (1987). A "practical, nontechnical" probability that incriminating evidence is involved is all that is required. *Texas* v. *Brown*, 460 U.S. 730, 742, 103 S.Ct. 1535, 1543, 75 L.Ed.2d 502 (1983).

The evidence presented to this court shows that the sweep conducted pursuant to the entry at La Gorce was limited to the search for other persons who might be on the premises. While the defendants have argued that such a search was not necessary due to the presence of the tear gas, this court finds that the agents acted reasonably and within the law in assuring themselves that no one was in fact present. Thus, this court finds that the scope of the search of the residence was not improper and recommends that suppression on this basis be DENIED. Similarly, the presence of the officers in the guest house, while awaiting the warrant, did not constitute an impermissible search or seizure. *See, Segura* v. *United States*, 468 U.S. 796, 104 S.Ct. 3388, 82 L.Ed.2d 599 (1984).

The remaining area of concern for this court is the discovery of the box of currency by Officer Seraydar. This court finds Seraydar's entry into the guest house, *alone*, somewhat suspect, particularly in light of the testimony that the guest house possibly harbored guards for the residence, especially when compared to the nature of the entry into the main house. Additionally, this court has some concerns over the facts testified to by Seraydar concerning the discovery of the money. How-

ever, no testimony has been presented to this court to show that a search of the closet went beyond that allowed by a protective sweep. The officer's testimony concerning the movement of the carpet and the view of the box would allow for a finding of a proper plain view discovery. Additionally, the officer had sufficient facts, via discovery of a box of currency, to give rise to a "probability that incriminating evidence" was present. *See, Texas* v. *Brown, supra*. Overall, this court finds that the discovery of the currency falls within the plain view doctrine, and thus, the suppression of this evidence should be denied.

II. 1247 SEMINOLE DRIVE

A. ENTRY INTO THE RESIDENCE

The entry into the Fort Lauderdale residence was based on an arrest warrant for Augusto Falcon and was conducted shortly after the entry into the La Gorce home.

According to Special Agent Humberto Rapado of the FDLE, he learned of the Falcon residence from Jorge Lopez after Lopez was apprehended at the La Gorce residence. (T. 1-175). Lopez informed the agents that Falcon had lived at the residence approximately nine months. (T. 2-173). After Lopez and Rapado drove to the residence from La Gorce, Lopez pointed to the home and stated that Falcon was not at home since he had a black BMW and it was not there. (T. 1-176).[7] Approximately one hour after observing the residence, Rapado was notified that a black BMW with a male driver had arrived at the residence.

Based on the law cited above, particularly *Payton*, this court finds that the officers had "reason to believe" that Falcon was

[7]There was extensive discussion during the hearing of the discrepancy between the government response to the motion which indicated that Falcon had a red BMW and the testimony by Rapado that the vehicle was black. Additionally, much debate took place concerning the alleged sequential numbering of the license plates observed at La Gorce and those at Seminole Drive. This court finds that these items of evidence, whether contradictory or consistent, are immaterial to a determination of the propriety of entering the residence based on an arrest warrant for Falcon.

within the premises. While Lopez was untruthful with the officers at the La Gorce residence, his association with the defendants was sufficient to require an investigation by the officers. When Lopez and Rapado went to Fort Lauderdale, they drove to a specific home, and Rapado specifically mentioned that Falcon was not there because the BMW was not present. This information was corroborated when a man in a BMW did show up and entered the premises. As indicated, this court finds that the difference in color between the BMWs mentioned by the government does not vitiate the probable cause present for the execution of the warrant. Accordingly, the motion to suppress based on improper entry should be DENIED.

B. SEARCH INCIDENT TO ENTRY

Deputy Cameron testified that, after the agents arrived at the home for the entry and announced their presence over a loudspeaker, a woman appeared in an upstairs window and then moved away. After a forced entry of the residence was made, a female (later identified as Alina Falcon) appeared on a catwalk, and after being ordered to come downstairs, she did so. At that point she was handcuffed and removed from the area near the door. After another announcement of their presence was made in the home, Falcon appeared with his hands up. He was also handcuffed and removed from the residence. (T. 1-211). Cameron stated that a room to room search then occurred, which lasted approximately ten minutes. The agents then went outside the residence. (T. 1-211-12). Falcon was transported from the residence between midnight and 12:30 A.M. (T. 1-241).

Agent Hiebert also testified about the search of the residence and stated that the agents searched all the rooms where someone could be hiding. (T. 3-159). Hiebert observed the cellular phones and the baggie with the powdered substance in plain

view while conducting this sweep. (T. 3-160). Hiebert testified that he left the residence at approximately midnight to 12:30 A.M. (T. 3-201).

Deputy Marshal Conboy testified that, while speaking with Mrs. Falcon after her apprehension, he requested some identification, so he accompanied her to the bedroom of the residence. (T. 2-58). Mrs. Falcon indicated where it was, and Conboy reached into a dresser drawer to retrieve it. (T. 2-59).

DEA Agent Jay Gregorius testified that he entered the residence approximately 10 to 15 minutes after the arrest warrant was executed and that Augusto Falcon was still present. (T. 2-186). Gregorius went in the residence to secure some cellular phones, a baggie which appeared to contain cocaine and some other items which he was told were seen in plain view during the security sweep. (T. 2-187). Gregorius testified that he found these items in plain view and secured them. He estimated that he left the residence at approximately 3:00 A.M. (T. 2-190). Gregorius was also present in the kitchen of the residence when Mrs. Falcon was later questioned. (T. 3-52).

DEA Agent Anthony Placido testified that the search warrant for the residence was executed the day after the arrest at approximately 2:00 P.M. (T. 3-210).

In support of the Motion to Suppress, Defendant Falcon presented attorney Jon May, who testified to an interview he held with Mrs. Falcon on August 6, 1992, immediately before her death. May testified that Mrs. Falcon stated that she and her husband were alone at the residence whey they heard a loud noise and heard men screaming in her home. (T. 4-16). She added that she left the bedroom, and was told by officers to come downstairs, where she was grabbed and taken out of the house. She stated that she told the agents that she did not know where Augusto Falcon was. (T. 4-27). Mrs. Falcon indicated that she was taken back into the house 30 to 45 minutes later, and saw the police looking around, opening drawers and

carrying various items out. (T. 4-20). Mrs. Falcon also stated that some of the items seized had not been in plain view, including currency and cocaine. (T. 4-22).

The defendant also presented testimony from Nancy O'Hare, who had rented the residence to the Falcons. O'Hare was at a nearby home the night of the arrests, and went to the scene when the entry began. O'Hare did not identify herself to the agents as the owner of the home, and did not approach or enter the residence at any time.

O'Hare testified that she saw Falcon being taken to a vehicle in handcuffs at approximately 12:30 A.M. (T. 4-97). O'Hare stated that she saw inside the home from a neighboring yard and observed Mrs. Falcon handcuffed in a kitchen chair while officers were searching the premises. O'Hare testified that the search included opening the kitchen cupboards. (T. 4-116). She stated this search occurred between 2:00 and 2:30 A.M. (T. 4-117). O'Hare also testified that the agents returned to the residence at about 10:30 the next morning and were looking through the house. (T. 4-125).

This court rejects O'Hare's testimony concerning the scope of the search. O'Hare's recollection of the events was almost too good, particularly in light of the fact that she could not even remember the address of the home she was renting at the time. Additionally, this court finds it somewhat incredulous that, as the owner of the home she never approached the officers while the search was taking place. Furthermore, her testimony concerning the officers' presence in the home the next morning is contradicted by evidence that the warrant was executed in the afternoon and by the fact that such a search would be unnecessary if the extensive search she described had taken place the night before.

Based on the law cited above, this court finds that the scope of the search at the residence on Seminole Drive was within that permitted as part of a protective sweep incident to an arrest. Accordingly, the motion to suppress on this basis should be DENIED.

RECOMMENDATION

It is the recommendation of this court that the Motion to Suppress Evidence at 98 La Gorce be GRANTED, and that the Motion to Suppress Evidence seized at 1247 Seminole Drive be DENIED.

The parties have ten (10) days from the date of this Report and Recommendation within which to serve and file written objections, if any, with the Honorable Federico A. Moreno, United States District Judge for the Southern District of Florida. Failure to file objections timely shall bar the parties from attacking on appeal the factual findings contained herein. *LoConte* v. *Dugger*, 847 F.2d 745 (11th Cir. 1988), *cert. denied*, 488 U.S. 958, 109 S.Ct. 397 (1988).

DONE AND ORDERED this 2nd day of September, 1993 at Miami, Florida.

STEPHEN T. BROWN
U.S. MAGISTRATE JUDGE

cc: Honorable Federico A. Moreno
Edward R. Shohat, Esq.
Simon Steckel, Esq.
Christopher J. Clark, Esq. – AUSA
Martin G. Weinberg, Esq.
Albert J. Kreiger, Esq.
Jeffrey S. Weiner, Esq.
Frank G. Rubino, Esq.

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF FLORIDA

CASE NO. 91-6060-CR-MORENO

UNITED STATES OF AMERICA,
Plaintiff,

v.

AUGUSTO G. FALCON, SALVADOR MAGLUTA, ORLANDO LORENZO, ANTONIO GARRUDO, ET AL.,
Defendants.

ORDER GRANTING MAGLUTA AND LORENZO'S MOTION TO SUPPRESS EVIDENCE SEIZED IN SEARCHES CONDUCTED ON OR ABOUT OCTOBER 15, 1991 AND ORDER DENYING FALCON'S MOTION TO SUPPRESS PURSUANT TO MAGISTRATE'S REPORT AND RECOMMENDATION

THIS CAUSE came before the Court upon Defendants Magluta and Lorenzo's Motion to Suppress Evidence Seized in Searches Conducted on or about October 15, 1991 at 98 East La Gorce Circle, Miami Beach and Defendant Falcon's Motion to Suppress Evidence Seized in Searches Conducted on or about October 15, 1991 at 1247 Seminole Drive, Fort Lauderdale.

THE MATTER was referred to the Honorable Stephen T. Brown, United States Magistrate Judge. A Report and Recommendation has been filed, recommending that Magluta and Lorenzo's motion to suppress be granted and that Falcon's motion to suppress be denied.

The Court has reviewed the entire file and record. The Court has made a *de novo* review of the issues presented by the objections to the Magistrate Judge's Report and Recommendation, and being otherwise fully advised in the premises, it is

ADJUDGED that United States Magistrate Judge Stephen T. Brown's Report and Recommendation is RATIFIED, AFFIRMED and APPROVED in its entirety, and based thereon, Magluta and Lorenzo's motion to suppress evidence seized at 98 East La Gorce Circle, Miami Beach is GRANTED; further, Falcon's motion to suppress evidence seized at 1247 Seminole Drive, Fort Lauderdale is DENIED.

DONE AND ORDERED in Chambers at Miami, Florida, this 30th day of September, 1993.

FEDERICO A. MORENO
UNITED STATES DISTRICT JUDGE

copies provided:

Christopher J. Clark, AUSA
David Troyer, AUSA
Jeffrey S. Weiner, Esq.
Frank Rubino, Esq.
Martin G. Weinberg, Esq.
Albert Krieger, Esq.
Ed Shohat, Esq.
Roy Black, Esq.